

86-798

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SUPREME COURT OF THE UNITED STATES

DOCKET NUMBER \_\_\_\_\_

Supreme Court, U.S.

FILED

NOV 17 1986

JOSEPH F. SPANIOLO  
CLERK

JIMMY BOYD  
Petitioner

VERSUS

McNEILAB, INC.  
Respondent

On Appeal From the United States District Court,  
Eastern District of Louisiana, State of Louisiana,  
Honorable Morley L. Sear, Judge Presiding

APPENDIX

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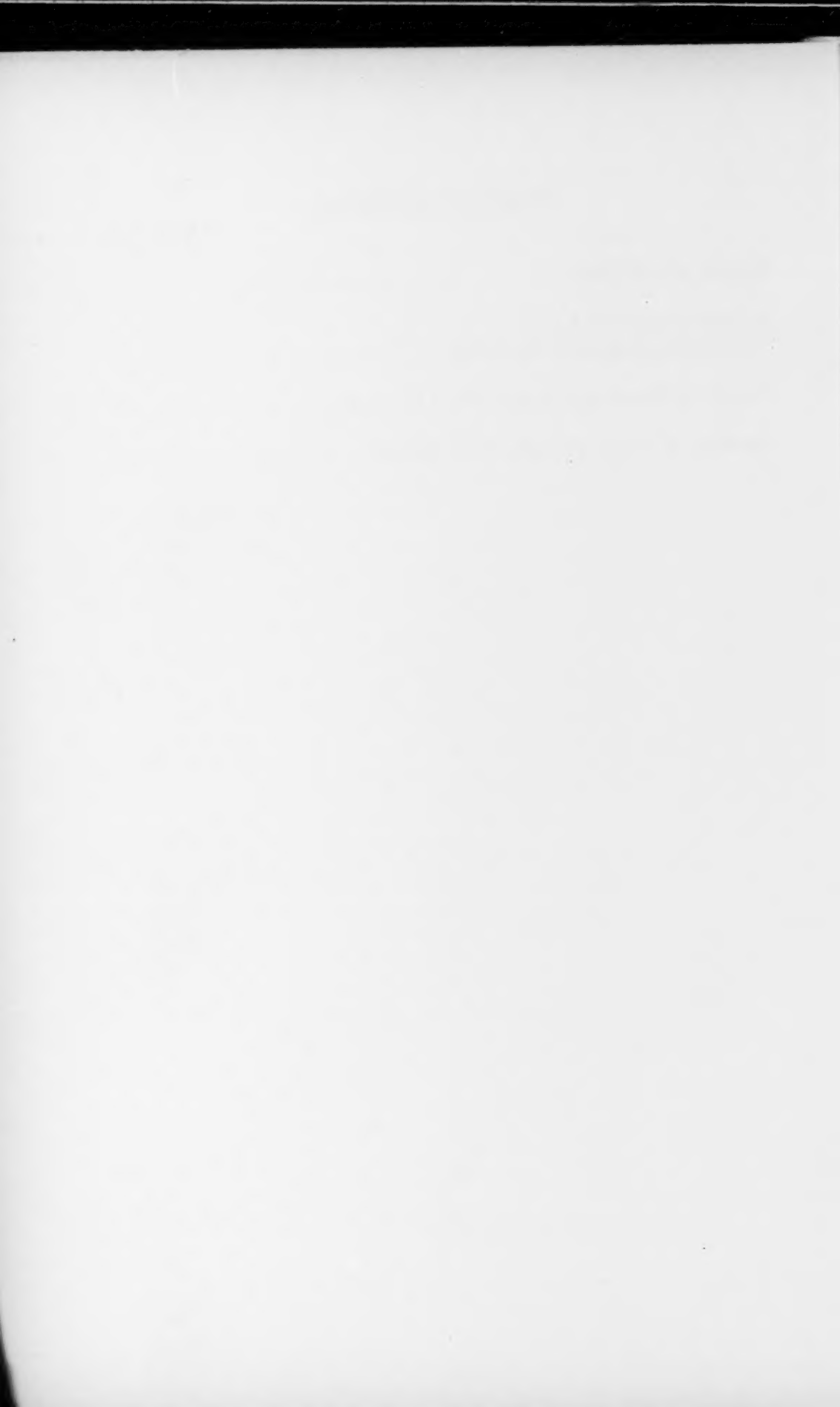
Attorney for Jimmy Boyd

UPP

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UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT  
OFFICE OF THE CLERK

August 19, 1986

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 86-3138 - Boyd vs. McNeilab

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

etc.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: \_\_\_\_\_  
Deputy Clerk

cc: Mr. Arthur Cobb  
Messrs. Richard B. Eason, II  
Henry B. Alsobrook, Jr.



JIMMY BOYD                   \*   CIVIL ACTION  
                              \*  
VERSUS                       \*   NUMBER 84-1582  
                              \*  
McNEILAB, INC.             \*   SECTION "G"(3)

PLTF ARTHUR COBB, ESQ

DEFT RICHARD EASON, ESQ

REPORTER: TOM MASSEY

COURTROOM DEPUTY: VIC BUCCOLA

JUDGE MOREY L. SEAR PRESIDING

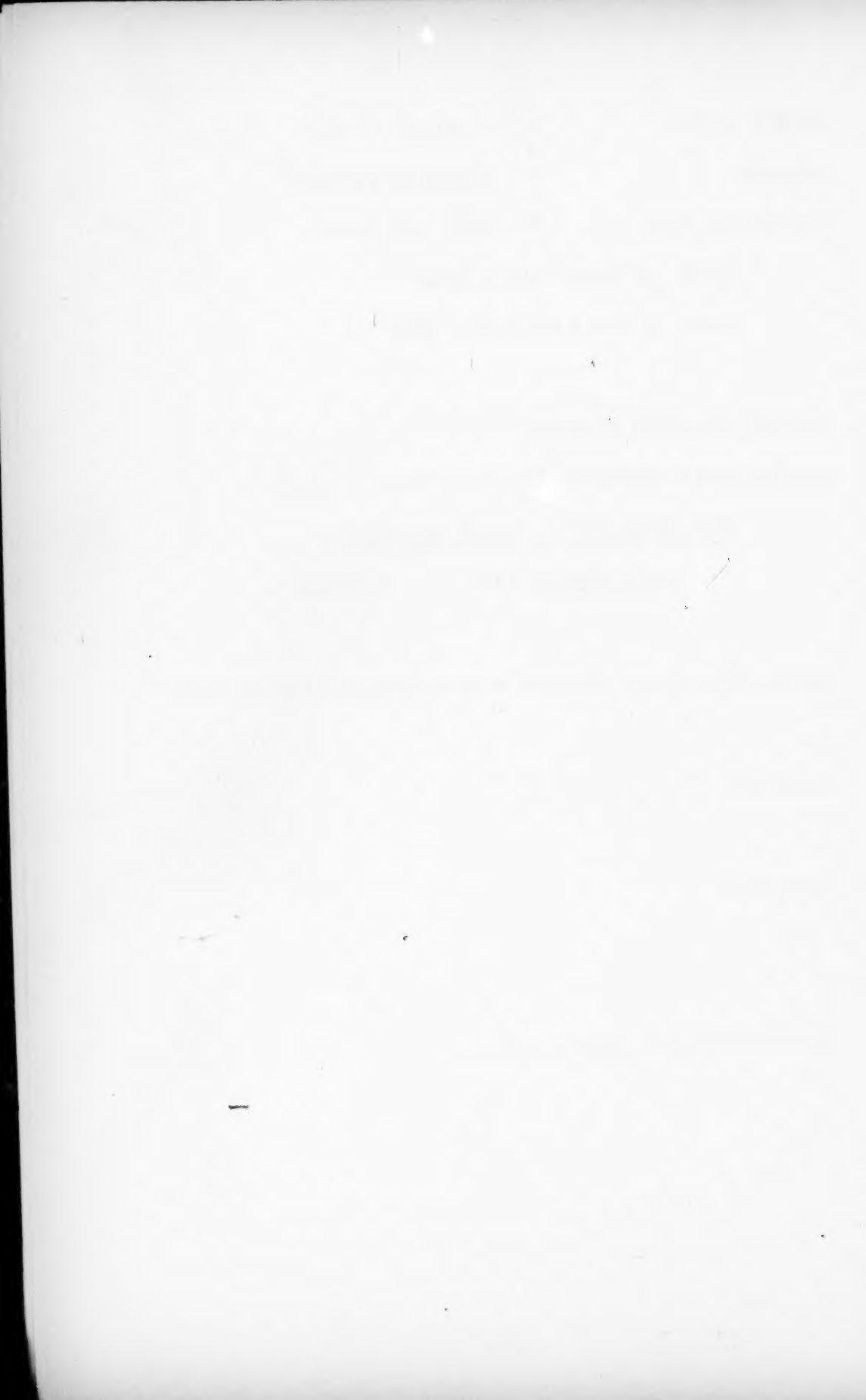
WED. FEB. 5, 1986           9:15 AM

DEFT (MCNEILAB, MOTION FOR SUMMARY JUDGMENT)

ARGUED

GRANTED

DATE OF ENTRY FEB 6 1986



IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 86-3138  
Summary Calendar

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JIMMY BOYD,  
Plaintiff-Appellant  
versus  
McNEILAB, INC., et al  
Defendants-Appellees

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Appeal from the United States District Court  
for the Eastern District of Louisiana

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(August 19, 1986)

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Before RUBIN, JOHNSON, and JONES, Circuit Judges.

JOHNSON, Circuit Judge:\*

Plaintiff James Boyd appeals from the district court's  
summary judgment in favor of the defendant McNeilab, Inc.  
We affirm that judgment.

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\*Local Rule 47.5 provides: "The publication of  
opinions that have no precedential value and merely decide  
particular cases on the basis of well-settled principles of law  
imposes needless expense on the public and burdens on the  
legal profession." Pursuant to that Rule, the court has  
determined that this opinion should not be published.





# I.

While recovering from an oilfield accident, James Boyd used the prescription analgesic Zomax. Boyd alleges that as a result of ingesting Zomax, he sustained a variety of physical problems. Boyd filed the instant strict products liability suit against the manufacturer of Zomax, McNeilab, Inc., alleging that (1) Zomax was defective and that (2) McNeilab had failed to provide adequate warnings regarding the dangers associated with Zomax.

After conducting extensive pretrial discovery, McNeilab filed a motion for summary judgment. According to McNeilab, the undisputed summary judgment proof established that it had properly warned the medical community regarding the potential dangers and side effects associated with the use of Zomax. McNeilab argued in the alternative that the undisputed summary judgment proof established that Zomax was not the cause of Boyd's alleged physical problems. In support of its motion, McNeilab produced sworn affidavits and deposition testimony of a number of physicians, including the physicians that treated Boyd.



In response, Boyd produced the affidavit of a pharmacist, James O'Donnell. O'Donnell's affidavit stated:

Affiant has reviewed the medical records and depositions, etc. that were provided to him regarding Jimmy Boyd. After reviewing this information, affiant has come to the conclusion that Zomax pills prescribed for and taken by Mr. Boyd were defective in that they posed serious risks of injury to the consumer, which information was not adequately disseminated.

It is affiant's further opinion that McNeilab, Inc. was negligent in allowing this product to be marketed and that the injuries and damages to Jimmy Boyd would appear to have been causally related to the Zomax he ingested.

Record Vol. II at 501. Boyd produced no other summary judgment proof regarding the adequacy of McNeilab's warnings. Boyd's remaining summary judgment proof dealt with the issue of causation.

After conducting a hearing, the district court granted summary judgment in favor of McNeilab. Boyd appeals.

## II.

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate where no genuine issue exists regarding any



material fact and the moving party is entitled to a judgment as a matter of law. This Court has held that "unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." **Galindo v. Precision American Corp.**, 754 F.2d 1212, 1216 (5th Cir. 1985) (citing C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure: Civil 2d §2738 [1983]). This is true even where the movant who seeks summary judgment cannot demonstrate contrary facts by specific affidavit recitation. **Fontenot v. Upjohn Co.**, 780 F.2d 1190, 1192 (5th Cir. 1986). See also **Shaffer v. Williams, et al.**, No. 85-1582, slip op. at 6775 (5th Cir. July 21, 1986) (Conclusory allegations supported by conclusory affidavit will not suffice to require a trial even where the movant who seeks summary judgment cannot demonstrate contrary facts.).

Louisiana law requires Boyd to establish, as an essential element of his strict products liability claim against McNeilab, that the Zomax he ingested contained a defect which rendered it unreasonably dangerous. See generally **Kinney v. Hutchinson**, 468 So.2d 714, 718 (La. App. 1985).



According to Boyd, Zomax was defective because it was marketed by McNeilab without adequate accompanying warnings. A prescription drug manufacturer's duty to warn generally extends only to the prescribing physician who serves as a "learned intermediary" between the manufacturer and ultimate user.<sup>1</sup> In **Cobb v. Syntax Laboratories, Inc.**, 444 So.2d 203, 205 (La. App. 1983), the court stated that:

The manufacturer of a prescription drug has the obligation to inform the prescribing physician of any potentially adverse side effects or risks from the drugs use....The manufacturer has no duty to warn the consumer directly of any risks or contraindications associated with the drug. The manufacturer of the drug has fulfilled its obligation when it has informed the prescribing and treating physicians of the risks of harm from the drug so they may intelligently decide on its use and advise the patient.

1. This is not a case where Boyd was provided Zomax by someone other than a prescribing physician. Compare Reyes v. Wyeth Laboraroties, 498 F.2d 1264, 1276-77 (5th Cir. 1974).

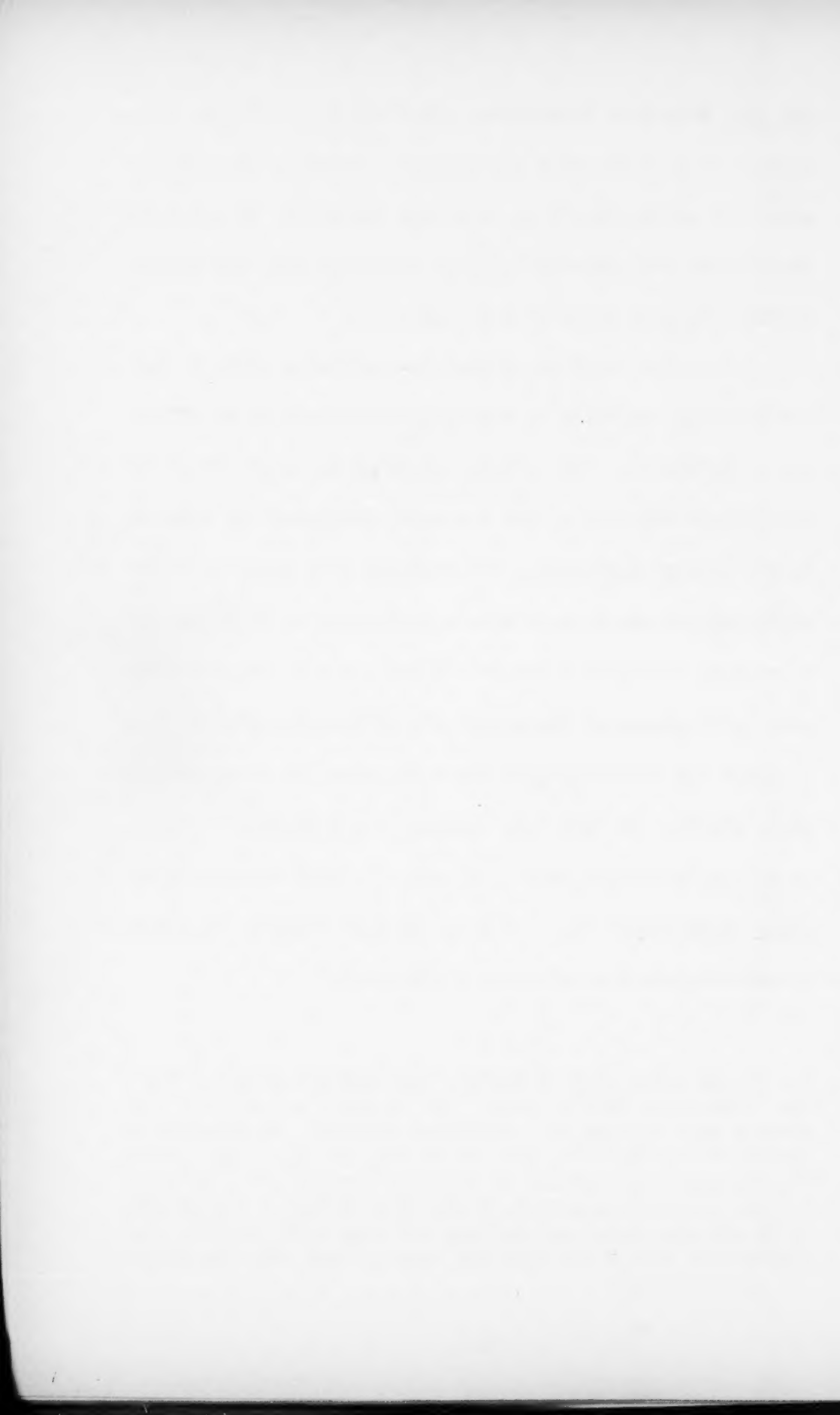




See also **Kinney v. Hutchinson**, 468 So.2d 714, 717 (La. App. 1985). Thus while Boyd has produced evidence that Zomax was not accompanied by warnings directed to ultimate consumers, the absence of such warnings did not render Zomax defective under Louisiana law.

Boyd has failed to produce any evidence relating that the warnings furnished by McNeilab to prescribing physicians were inadequate. The undisputed summary judgment proof established that Zomax was marketed with warnings directed to prescribing physicians. The only summary judgment proof regarding the adequacy of warnings advanced by Boyd was the conclusory affidavit of James O'Donnell stating that warnings were not "adequately disseminated". O'Donnell's affidavit fails to state the evidence upon which he based his conclusion or even whether he has ever examined the Zomax warnings. Moreover, O'Donnell fails to identify why the Zomax warnings were insufficient to create a factual dispute regarding whether Zomax was defective as marketed.<sup>2</sup>

2. Boyd's claim that McNeilab "negligently" failed to warn the consuming public about the dangers associated with Zomax does not require a different analysis. As observed in *Miller v. Upjohn Co.*, 465 So.2d 42, 45 (La. App. 1985), "[a]lthough strict liability in products liability cases exists in normal circumstances independent of a finding of negligence, it is at the point of warning of drug side effects that negligence and strict liability became one and identical." (citation omitted).



Neither Boyd nor the summary judgment proof has specified any other defect that would render Zomax unreasonably dangerous.<sup>3</sup> The judgment of the district court is, therefore,

AFFIRMED

3. We do not reach the issue of whether Boyd's summary judgment proof was adequate to create a factual dispute on the issue of causation.